

Exhibit 51

Document title:	Opinion Mason Rothschild's MetaBirkins were art, but the jury couldn't see it - The Washington Post
Capture URL:	https://www.washingtonpost.com/opinions/2023/02/24/mason-rothschild-metabirkins-art-bad-jury-verdict/
Page loaded at (UTC):	Fri, 24 Feb 2023 22:12:46 GMT
Capture timestamp (UTC):	Fri, 24 Feb 2023 22:13:30 GMT
Capture tool:	10.20.11
Collection server IP:	54.157.181.49
Browser engine:	Mozilla/5.0 (Windows NT 10.0; Win64; x64) AppleWebKit/537.36 (KHTML, like Gecko) Chrome/108.0.5359.215 Safari/537.36
Operating system:	Windows_NT (Node 16.17.1)
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Opinion

| A misguided jury failed to see the art in Mason Rothschild’s MetaBirkins

By Blake Gopnik

February 24, 2023 at 8:00 a.m. EST



Examples of MetaBirkins, images traded as NFTs, created by Mason Rothschild and based on the Hermes Birkin bag. (Images provided by Mason Rothschild)

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Blake Gopnik is a former Post art critic and the author of “Warhol,” a comprehensive biography of the pop artist.

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That artists make pictures of things

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That artists make pictures of things.

That good artists make pictures of things that are important in their culture: Christian saints, or urban life, or maybe cans of condensed soup.

That these artists — or more often their dealers, collectors or fans — title those pictures after the important things they show: “[The Virgin and Child with Saint Anne](#),” “[A Bar at the Folies-Bergère](#),” and, yes, “[Campbell’s Soup](#).”

And then such artists very often do their very best to earn as much money as they can from the pictures they’ve made: Leonardo da Vinci and Andy Warhol both loved making a buck.

All these “facts” that I hope we’ve agreed on apply just as well to a 28-year-old American artist named Mason Rothschild. Late in 2021, he released 100 digital pictures based on the [Birkin bags of Hermes](#), the luxury-goods giant, which are beyond iconic in our culture of consumption. Rothschild then did his best to find an audience for his new pictures, which he called MetaBirkins, and he soon found one, since they depicted something important and named it in their title. Offered for sale via the digital contracts called NFTs, they also found a fine market — which Rothschild did his very best to pump up.

On Feb. 8, a federal [jury in New York](#) somehow decided that because the culturally important subject that Rothschild had chosen to depict was trademarked — and because that trademark was also in his title and he’d worked so hard to make a buck from his depiction — he’d done something wrong and would have to pay \$133,000 in damages to a company worth something like \$200 billion. All this, because the jury concluded that what Rothschild did, which was so very much like what artists have always done, did not count enough as “artistic expression” — was too much about aping Hermes — to be covered by the free-speech guarantees of the First Amendment.



Jane Birkin's "Birkin" bag by Hermes goes on view during the "Bags: Inside Out" press view at Victoria and Albert Museum on Dec. 8, 2020, in London. (Tristan Fewings/Getty Images)

When Rothschild's lawyers first came to me about the lawsuit against him, I agreed to serve as an expert witness, since I recognized the absurdity of Hermes's case — and that it was basically an attack on art's fundamentals. (I was paid but charged only about a third of my normal fee.)

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I couldn't see any real difference between Rothschild and the many artists, good and bad, who made art about our culture's commerce, often by including trademarked goods: There's Warhol and his Campbell's Soups, Coca-Colas and Brillo Boxes, of course, but also the great [political artist Hans Haacke](#), who made works around the trademarks of [Marlboro and Mobil](#) — they were in a major New Museum show in 2019 — and the talented photo artist Christopher Williams, whose [images of Nikon cameras](#) and other trademarked photo gear made [a splash at the Museum of Modern Art](#) in 2014. And there's a whole bunch of less

[Marlboro and Moët](#) — they were in a major New Museum show in 2019 — and the talented photo artist Christopher Williams, whose [images of Nikon cameras](#) and other trademarked photo gear made [a splash at the Museum of Modern Art](#) in 2014. And there’s a whole bunch of less widely known conceptualists working in the Warholian tradition of “business art,” who have wanted their artmaking to be easily confused with pure commerce.

Earlier artists also profited from including trademarked goods in some of their most famous paintings, and I guess Hermes must wish they hadn’t been allowed to: Edouard Manet’s “Bar at the Folies-Bergère” has its famous bottle of Bass Pale Ale, with that signature red triangle — said to be the oldest trademark in England — and Pablo Picasso put Pernod and other notably branded liquors into his still lifes. Trademarks were too important a part of modern life to leave out.

Compared to a lot of these precedents, Rothschild’s MetaBirkins positively obscure their connection to the brand. The Birkin-ish bags Rothschild depicted could only ever have existed in his over-fertile imagination: He portrayed them covered in the most garish fake fur, such as it’s almost impossible to imagine on an actual Birkin bag. That Hermes product was born as a symbol of restrained good taste; Rothschild’s digital images were as goofy, campy and unrestrained as could be.

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In the end, I was not allowed to present my findings to the jury — after the case went to trial, the judge decided that art history was not a rigorous enough discipline to have a say in his court — but I still imagined that no jury would actually prevent a young artist from making pictures of pretty much whatever he wanted, whether it bothered a great bag-maker or not. I thought the more the art bothered that bag-maker, the clearer it would be that Rothschild was on to something potent, and that the jury would see that right off.

I was wrong about that jury, but hope an appeals court will realize that the jury was wrong about Rothschild’s art.

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